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BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

DEPARTMENT OF TRANSPORTATION
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In the Matter of	)	
FEES FOR FAA SERVICES FOR CERTAIN FLIGHTS	)	Docket No. FAA-00-7018 -34 Amendment No. 187-11
Interim Final Rule	)	

COMMENTS OF

THE ASSOCIATION OF ASIA PACIFIC AIRLINES

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Dated: 29 June 2000

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THE ASSOCIATION OF ASIA PACIFIC AIRLINES

The Association of Asia Pacific Airlines (AAPA) files these comments on behalf of its members in response to Amendment 187-11 (65 FR 36002 [6 June 2000]) issued by the Federal Aviation Administration (FAA). AAPA member airlines may also file individual comments on this matter. The Interim Final Rule in Amendment 187-11 establishes fees for FAA air traffic and related services for certain aircraft that transit U.S.-controlled airspace but neither take off from, nor land in, the United States. These overflight fees are to take effect on 1 August 2000.

I. THE ASSOCIATION OF ASIA PACIFIC AIRLINES

The AAPA is the trade association representing major air carriers based in the Asia Pacific region. Its eighteen members include: Air New Zealand, All Nippon Airways, Ansett Australia, Asiana Airlines, Cathay Pacific Airways, China Airlines, EVA Airways, Dragonair, Garuda Indonesia, Japan Airlines, Korean Air, Malaysia Airlines, Philippine Airlines, Qantas Airways, Royal Brunei Airlines, Singapore Airlines, Thai Airways International, and Vietnam Airlines. The organization was founded in 1966 to provide a forum for examining international air transport issues and for developing action plans on matters of mutual concern.[1] The AAPA accepts the general principle of paying fees for air traffic services if those fees are based on actual costs for the services rendered and there are meaningful and adequate consultations prior to the fees being introduced as well as after the fees are initiated.

[1] The Association of Asia Pacific Airlines was known as the Orient Airlines Association from its inception until member carriers voted to change the organization's name in late 1996.

II. STATEMENT OF THE AAPA POSITION

The AAPA is deeply concerned about the FAA's introduction of overflight fees via an Interim Final Rule. The AAPA member airlines that overfly U.S.-controlled airspace object to the Interim Final Rule process in that it does not provide all interested and affected parties an adequate opportunity to meaningfully debate the issues. The member airlines are also concerned that besides such procedural issues, the Interim Final Rule process has led to several substantial defects that could have been avoided if the FAA had used a Notice of Proposed Rulemaking. Such rulemaking would have allowed the opportunity to resolve these concerns before collecting money from airlines.

III. PROCEDURAL CONCERNS

The FAA failed to comply with the Administrative Procedures Act (APA) by issuing a new overflight fees rule without prior notice and comment. Under the APA, the FAA must provide interested persons with prior notice of, and an opportunity to, comment on a new rule before the rule becomes effective. There is a strong legal presumption that a new rule issued by an agency must follow this fundamental aspect of U.S. administrative law. The FAA has also failed to meet international requirements and commitments with this new rule for overflight fees.

A. The Court Has Indicated FAA Should Follow APA Requirements

In vacating the FAA's initial overflight fees rule, the court concluded that the Congress, under the 1996 Act that authorized the fees, expressly directed the FAA not to comply with the APA only in issuing the initial overflight fees schedule. The court based this conclusion on its view that the 1996 Act (1) told the FAA to issue the "initial fees schedule" as an "interim final rule" and (2) expressed the desire by Congress that the FAA collect $100 million during the first year following passage of the 1996 Act. The court stated that the FAA had to move quickly to establish a fees schedule and collection process to fulfill this statutory goal.

The court also said that the APA would apply after the initial fee schedule was issued. The court found that even though the 1996 Act does not establish a specific timetable for every step in the regulatory process, it expresses a congressional intent to depart from normal APA procedures with respect to the initial fee schedule. The FAA followed that intent as far as it went. Notably, the court went on to state that it is probably the case that once the FAA issued the initial fee schedule, the APA once again became controlling for all subsequent proceedings. Any revised fees schedule that the FAA subsequently adopts, therefore, will not be an "initial fees schedule" subject to the Interim Final Rule process but rather "revised" fees that are subject to the APA and notice and comment before fees take effect.

B. Congress Has Not Exempted FAA From APA Requirements

There is no directive from the Congress that any revised or otherwise subsequent overflight fees schedules take effect without prior notice and comment under the APA. The Congress has given no indication in legislation subsequent to the 1996 Act that the FAA remains under an expedited rulemaking timetable to establish an overflight fees schedule. There is also no specific requirement or expressed desire by the Congress that the FAA collect $100 million from new fees within less than a year. With the Congress silent on how the FAA should proceed in the given circumstances, it is only appropriate that the APA notice and comment procedures must be followed.

C. FAA Is Not Meeting International Commitments

By issuing an Interim Final Rule for these new overflight fees, the FAA is not allowing for appropriate consultations and information under international commitments. The FAA, for example, has not complied with international commitments of the United States under the Chicago Convention, as well as commitments under a number of bilateral agreements concluded by the United States with other nations.

An Interim Final Rule also does not conform to the International Civil Aviation Organization (ICAO) recommendation regarding consultations prior to introduction of a new system of charges such as that which the FAA has introduced. It is ironic that in its 1997 Overflight Fees Interim Final Rule, the FAA referred to the principles set forth by ICAO on charges for airports and air navigation services.

The U.S. Government can ill afford to send a message to the world that as a major proponent of developing ICAO standards, it is acting in contravention to those very principles it wants other countries to adhere to. Unfortunately, the U.S. Government has failed to set an example of the proper manner through which new charges systems are introduced. The AAPA would note that NAV CANADA, in setting Canadian charges for air traffic services, has consulted extensively with and continues to consult with users.

D. FAA Has Compromised the Right to Judicial Review

One of the problems associated with the FAA using an interim final rule where the new fees become effective before comments are considered and acted on by the agency is that there is no specific deadline for the FAA to issue a final rule. This means that the FAA may delay issuing a final rule on overflight fees for many years.

Under the interim final rule process that the FAA has used for these fees, unless an affected carrier files a petition with the Court of Appeals to challenge the new rule by the end of July 2000, that carrier may have to wait years to have the FAA's methodology for calculating the new fees reviewed by the court.[2] By requiring the FAA to receive and

[2] A carrier could refuse to pay the fees and try to challenge the fees in defense of a collection case brought by the government or its agent, but this tactic contains risks for the carrier not present in a direct petition to review the rule.

consider comments before the new rule becomes effective, and by allowing parties to file court petitions within 60 days after the first effective rule is issued, the right to judicial review would not be unfairly subject to the FAA's unilateral decision as to when, if ever, to issue a final rule.

IV. SUBSTANTIVE CONCERNS

The new overflight fees fail to comply with the statutory requirement that each fee be directly related to the FAA's costs to provide the service rendered. The 1996 Act requires that each of the fees for overflights be directly related to the FAA's cost of providing the service rendered to aircraft that neither take off from, nor land in, the United States. As the court observed in vacating the FAA's initial overflight fees rule, the Congress intended that the fees be established in such a way that each flight pays according to the burden associated with servicing it.

A. The New Fees Are Not Directly Related To Costs for Services

The FAA acted in an arbitrary and capricious manner in assuming that its cost to provide air traffic control and related services to overflights in the en route environment is the same as its cost to provide service to transitional flights in the en route environment. The FAA assumed that the unit costs for providing service to overflights within each environment is identical to the unit costs for providing service to all air traffic within each environment.

It would appear, however, that the FAA expends greater resources to provide service to transitional flights that takeoff and/or land in the United States and are thereby transitioning at some point between high-altitude cruising level and so-called hand-off to and/or from a FAA control tower at a U.S. airport.[3] There is certainly no evidence in the overflight fees docket to support the FAA's assumption that overflights and transitional flights use the same level of service. By mixing overflights with transitional flights, the FAA has failed to ensure that overflying aircraft are paying fees that are based solely on the burden associated with servicing that flight.

The FAA also improperly assumes that its costs to provide service to overflights in the oceanic environment are the same in all geographic areas within U.S.-controlled airspace. Labor charges for oceanic service primarily reflect staffing in the four facilities located in Anchorage, Houston, New York, and Oakland. The FAA, however, provides no justification that these labor rates are identical in each facility.

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[3] Service provided by FAA at control towers is included within the terminal environment. The "Costing Methodology Report" by Arthur Andersen relates to FAA costs for en route and oceanic service, but does not include terminal service.

B. FAA Has Not Adequately Explained Some Costs

It is unclear why the FAA's costs to provide service for overflights jumped over fifty percent, a significant increase, from fiscal year 1998 to fiscal year 1999. The FAA determined costs related to overflights were about $32 million for fiscal year 1998. In the new overflight fee rule, the FAA reports that its costs to provide service to overflights totaled over $48.5 million in fiscal year 1999.

Given that the FAA's purported costs to provide service in the oceanic environment are only 4 percent as high as the agency's costs to provide service in the en route environment ($94 million for oceanic and $2.4 billion for en route), it is unclear why the FAA set oceanic fees at a level that is 54 percent of the level it set for en route fees ($20.16 per 100 nautical mile for oceanic and $37.43 per 100 nautical miles for en route). The AAPA is concerned that this represents an improper over-allocation of FAA costs to the oceanic environment.

C. FAA Has Not Followed Congressional Intent in Setting the New Fees

The FAA's fee methodology is contrary to congressional intent in authorizing the new fees. Simply stated, the Congress wanted the FAA to determine what additional cost it incurs to provide service to overflying aircraft that it would not already incur to provide service to aircraft that land or takeoff in the United States.

The Congress did not direct the FAA to establish user fees based on the agency's total costs to provide service in the oceanic and en route environments and then charge overflights a fee based on those costs. Rather, the Congress wanted overflights to compensate the FAA for the additional costs it incurs to provide service to overflights. For the FAA to determine the costs to provide service to overflights that would not otherwise be incurred to provide service to non-overflights, the agency needs to (1) calculate the marginal or average variable costs to provide service to overflights, and (2) allocate some portion of fixed costs to reflect the need for some additional level of fixed costs that would not be necessary if the FAA provided no service to overflights. Until the FAA develops and implements a supportable methodology reflecting this formula, it will not have complied with the intent of Congress.

V. CONCLUSIONS

In closing, the AAPA wishes to reiterate its objection to the vehicle of an Interim Final Rule in implementing overflight fees and to express its support for meaningful and adequate consultations prior to fee imposition.

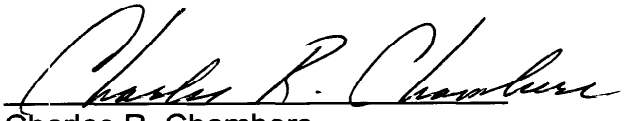
It is quite disconcerting to see the FAA move ahead using an Interim Final Rule with such clear indications that it is not the appropriate process. It seems the FAA has chosen to ignore the concerns of affected parties and to charge ahead when there was no reason to do so, including no requirement by the Congress and clear direction from

the court that the APA should apply in this case.

It is the AAPA's hope that the U.S. government and the FAA will consider carefully the consequences of its actions, and reconsider its implementation of overflight fees by an Interim Final Rule.

The Association of Asia Pacific Airlines is grateful for the opportunity to provide these comments on the FAA Interim Final Rule establishing overflight fees.

Respectfully submitted,



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